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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

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October, 1979

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Appendix A

Opinion of the Court of Appeals of the State of New York, May 1, 1979

OPINION

STATE OF NEW YORK

COURT OF APPEALS

No. 150

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

No. 151

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

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(150) (151) JOSEPH D. BLOCK & PETER GARAM. NY City *for appellant* in (150).

Appendix A

TELFORD TAYLOR, WALTER A. BOSSERT, JR. and DAVISON W. GRANT, NY City, *for appellant* in (151).

HOWARD J. READ and PETER H. SCHIFF, Albany *for respondent* in each matter.

COOKE, Ch. J.:

We determine here whether the Public Service Commission exceeded its statutory authority or impinged upon First Amendment rights by restricting certain advertising and promotional practices of public utilities. For the reasons outlined, we hold that the Public Service Commission was within its authority in imposing the restrictions, and that petitioners' expressional rights were not unconstitutionally impaired.

I

Respondent, New York Public Service Commission, exercises regulatory and supervisory powers over public utilities licensed to operate in the State (see Public Service Law, §§ 5, 66). In 1973 the Commission, reacting to the Arab oil embargo, prohibited electric corporations "from promoting the use of electricity through the use of advertising, subsidy payments * * * or employee incentives". Although the immediate crisis created by the embargo dissipated, no repeal of the promotional ban was effected by the Commission. Then, in July of 1976, the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices". Petitioners, Central Hudson Gas & Electric Corporation and Consolidated Edison Company of New York, Inc., as well as other interested parties, responded to the notice, arguing for relaxation of the promotional ban on both policy and constitutional grounds.

After reviewing the comments received and conducting its evaluation of the problem, the Commission rendered a decision on February 25, 1977 entitled "Statement of Policy on Advertising and Promotional Practices of Public Utilities". In its statement, the Commission concluded "that the existing ban on promotion of electricity sales should be continued". Its reasoning

for continuation of the prohibition was succinctly stated: "[C]onservation of energy resources remains our highest priority * * *. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

That same day, the Commission released an order addressing the topic of utility bill inserts. By that order, the Commission directed all utilities subject to its jurisdiction to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". This restriction, too, was partially explained in the Commission's policy statement: "We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues * * * is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the utilitys message."

Dissatisfied with the decision, Central Hudson and Con Edison petitioned for a rehearing, which was denied by the Commission on July 14, 1977. Central Hudson then commenced an article 78 proceeding challenging the advertising and insert bans. Con Edison instituted a separate proceeding in which it objected to only the billing insert measure. Special Term, in brief opinions, ruled that while the Commission had power to impose the promotional advertising restriction, it lacked authority to prohobit the use of bill inserts. On appeal, the Appellate Division modified, sustaining both branches of the Commission's determination.

II

At the outset, petitioners challenge the Commission's statutory authority to regulate the content of billing envelopes and the promotional advertising practices of public utilities. It is, of course, a fundamental postulate of administrative law that the Public Service Commission, like other agencies, is possessed of only those powers expressly delegated by the Legislature, together

with those powers required by necessary implication (see, e.g., *Suffolk County Builders Association, Inc. et al* v. *County of Suffolk, et al,* NY2d [decided 4/5/79]; *Matter of National Merchandising Corp.* v *Public Serv. Comm.*, 5 NY2d 485, 489; cf. *Matter of Bates* v *Toia,* 45 NY2d 460, 464). Nevertheless, the absence of explicit statutory authorization need not be fatal to a given assertion of regulatory power by the Commission. For, as we have recognized previously, the Legislature on occasion broadly declares its will, specifying only the goals to be achieved and policies to be promoted, while leaving the implementation of a program to be worked out by an administrative body (see, e.g., *Matter of Sullivan County Harness Racing Assn.* v. *Glasser,* 30 NY2d 269, 276; cf. *Matter of Bates* v. *Toia, supra*). In such cases, the sheer breadth of delegated authority precludes a precise demarcation of the line beyond which the agency may not tread. What is called for, rather, is a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment (cf. *Matter of Broidrick* v *Lindsay,* 39 NY2d 641, 646).

In the context of this case, without doubt, the Legislature has conferred vast power upon the Public Service Commission (see, e.g., Public Service Law, §§ 4, 5, 65, 66; cf. *Matter of Public Serv. Comm. of State of N. Y.* v *Jamaica Water Supply Co.*, 42 NY2d 880, affg 54 AD2d 10). Indeed, the Commission is expressly endowed with "all powers necessary or proper to enable it to carry out the purposes of" the Public Service Law (Public Service Law, §4, subd. 1). Added to this is the Commission's specific power of "general supervision of all gas corporations and electric corporations" and "all gas plants and electric plants" (Public Service Law, §66, subd. 1).

In light of current exigencies, one of the policies of any public service legislation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the Commission a duty "to encourage all persons and corporations * * * to formulate and carry out long-range programs * * * [for] the preservation of environmental values

and the conservation of natural resources" (Public Service Law, §5, subd. 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and nation. More important, conservation of resources has become an avowed legislative policy embodied in the Commission's enabling act (see, also, *Matter of New York State Council of Retail Merchants* v *Public Serv. Comm. of State of N. Y.*, 45 NY2d 661, 673-674).

It necessarily follows, therefore, that the Commission possesses ample power to prescribe reasonable measures designed to prevent wasteful consumption or unneeded expansion of utility services. By prohibiting promotional advertising of electric power, the Commission has taken precisely such a step. In its expertise, the Commission could have reasonably concluded that promotional advertising might tend to increase injudicious and unnecessary consumption of electrical power. Given this, the authority for the advertising ban becomes apparent.

Nor did the Commission exceed its jurisdiction by prohibiting the inclusion of inserts in utility billing envelopes. The Legislature has granted the Commission express authority "to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity * * *" (Public Service Law § 66, subd. 12-a).[1] Incident to that authority and in the same subdi-

[1] Added by Laws of 1977, chapter 527, approved Aug. 1, 1977. In a case such as this one, in which the effectiveness of the Public Service Commission's prohibitions has been judicially stayed by interim orders during the course of this litigation such that they have not yet attained practical vitality, we have no difficulty in applying to this appeal the principle that we must decide the case on the basis of the law as it exists today. (*Strauss* v *University of the State of New York*, 2 NY2d 464, 465.) It would be but a futile exercise to annul the PSC determination on the basis of prior law only to have the agency validly repromulgate its order under the recent amendment.

vision it is provided that the "commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy". Thus, the Legislature has authorized the Commission to regulate not only the format and informational content of the bill itself but the entire billing communication. Petitioners invite us to read these provisions narrowly, restricting the Commission's jurisdiction to the actual billing instrument itself rather than extending it to the entire contents of the billing envelope. This artificial distinction must be rejected. By necessary implication, the statute, if it is to amount to more than an empty adage, must provide the Commission with authority to oversee the distribution of bill inserts. Were the agency's power construed to extend only to the bill itself, control over informational content and format "to assure simplicity and clarity" could be severely hampered if not totally undermined. While the bill might be simple and clear, utilities could literally inundate consumers with a morass of irrelevant and conflicting data, forms, and pamphlets, causing confusion and oversight. Indeed, granting the utilities unfettered discretion to include all materials would negate the legislative goals of simplicity and clarity. It is difficult to conceive a legislative intent to permit such a disordered pattern. A more acceptable alternative is an interpretation of the statute empowering the Commission to regulate the billing process as a whole.

This construction becomes all the more reasonable when viewed in the context of the entire regulatory scheme. Rather than restricting the PSC's authority, the Legislature has invested that agency with all powers needed to carry out the purposes of the Public Service Law, as well as power to supervise generally the operation of electric and gas corporations and electric and gas plants (Public Service Law, §4, subd 1; §66, subd 1). In view of the expansive definitions of electric and gas plants (Public Service Law, §2, subds 10, 12), the Commission's supervisory authority must be taken to extent to those "useful and necessary services [and property] which facilitate" or are used in connection

with the "manufacture, conveying, transportation, distribution, sale, or furnishing" of utility power (*Matter of National Merchandising Corp.* v *Public Serv. Comm.*, 5 NY2d 485, 490-491; Public Service Law, §2, subds 10, 12). Control of the billing procedure, a process necessarily adjunct to the furnishing of utility service, thus fits neatly into the PSC's supervisory role. This supervisory power, combined with the more specific billing regulatory authority, provides ample justification for Commission oversight of billing envelope content.

To summarize, the Public Service Commission is possessed of sufficient statutory power to prohibit the promotional advertising of electricity and to prescribe the content of electric and gas corporation consumer billing envelopes.

III

The Commissions actions being within the limits of its delegated authority, petitioner's First Amendment contentions must be addressed. The constitutional attack is directed at both the outright prohibition of promotional advertising and the ban on bill enclosures dealing with controversial topics.

Analysis in the First Amendment area proceeds on one of two tiers, depending upon the nature of the restriction which government has imposed (see, e.g., Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv L Rev 1482). At one level, government regulation designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny. Absent some compelling justification, such as a likelihood that speech will incite "imminent lawless action", content-oriented restrictions may not stand (*Brandenburg* v *Ohio*, 395 US 444, 447; see *Hess* v *Indiana*, 414 US 105; *United States* v *O'Brien*, 391 US 367, 376-377; see, generally, Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan L Rev 719). On the second tier are those governmental

measures which, although not directly aimed at all communication, inhibit the free flow of information or ideas. The validity of such a restraint is gauged by balancing the various competing interests, with due regard for the status of First Amendment rights in our constitutional scheme. Thus, so long as a facially neutral regulation does not unduly constrict the exercise of protected rights, it is not unconstitutional (compare *Buckley* v *Valeo*, 424 US 1, 60-84, with *Schneider* v *State*, 308 US 147; see, generally, Note, Less Drastic Means and the First Amendment, 78 Yale L J 464).

A

In the present case, the prohibition on billing inserts, which was designed to vindicate the privacy rights of utility customers, constitutes at best an indirect restraint upon expressional activity. It extends not to all speech of a prescribed content, but only to one manner of communication. No one viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums effected. In short, the PSC is concerned with but one particular means of expression, and then only to a limited extent.

It is well settled that government may impose reasonable restrictions upon the time, place and manner of communication (see, e.g., *Grayned* v *City of Rockford*, 408 US 104, 115-117; *Kovacs* v *Cooper*, 336 US 77; *Cox* v *New Hampshire*, 312 US 569, 575). To constitute a valid time, place and manner restriction, a regulation must be content neutral, supported by a significant govenmental interest, and not foreclose alternative channels of expression (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council*, 425 US 748, 771). Respondent PSC urges that its billing insert decree satisfies these criteria. It is correct.

There is no doubt but that the regulation leaves open numerous alternative means of communication. On its face, the ban only reaches expressional activity conducted through the billing envelope. Whatever other modes of speech were open

to utilities prior to the effective date of the Commission order remain available. That the cost of utilizing these alternative channels may be higher is not determinative, especially where, as here, petitioner has wholly failed to demonstrate that it will be effectively precluded from exercising its rights (see, e.g., *Kovacs* v *Cooper*, 336 US 77, 88-89).

In a similar vein, the ban unquestionably fosters an important governmental interest. Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word * * * a different or more preferred status because [it is] sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another" (*Rowan* v *Post Office Dept.*, 397 US 728, 737; see, also, *Martin* v *Struthers*, 319 US 141; Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum L Rev 960). A governmental agency such as the PSC may take appropriate steps to protect this privacy right of its constituents (*Kovacs* v *Cooper*, *supra* at pp 86-89; *Cohen* v *California*, 403 US 15, 21-22; see, also, *Public Utilities Comm'n.* v *Pollak*, 343 US 451, 466-469 [Douglas, J. dissenting]).

Finally, the regulation, properly viewed, is not content oriented. True, the directive sweeps within its strictures only those bill inserts treating controversial topics. But it does not discriminate against persons of any particular political stripe or prohibit

the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik* v *City of Jacksonville*, 422 US 205, 209; see *Greer* v. *Spock*, 424 US 828, 838-839; *Lehman* v *City of Shaker Heights*, 418 US 298, 302-304; see, Tribe, American Constitutional Law, § 12-21, at pp 690-691, & n 21).

Accordingly, because it satisfies the above criteria, the PSC order banning bill inserts constitutes a valid time, place and manner regulation.

B

To be contrasted is the Commission directive proscribing all promotional advertising of electric service. Rather than an oblique inhibition, this order works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society. As noted, content-oriented regulations have been subjected to an exacting standard of review, the precise level of that standard being determined by reference to the nature of the communication.

Until recently, communication in the commercial sphere would not have been accorded any First Amendment recognition (compare *Valentine* v *Chrestensen*, 316 US 52, with *Bigelow* v *Virginia*, 421 US 809). While now entitled to a measure of constitutional protection, the full panoply of safeguards afforded more traditional communications does not necessarily attach (*Ohralik* v *Ohio State Bar Assn.*, 436 US 447, 456). Our task, therefore, is to apply the emerging principles of the commercial speech doctrine to the present context.

A common theme sounding in commercial speech cases is the notion that society, as a whole, "may have a strong interest in the free flow of commercial information" (*Va. Pharmacy Bd.*

v *Va. Consumer Council*, 425 US 748; 764, 765; see, e.g., *Linmark Associates, Inc.* v *Willingboro*, 431 US 85, 92; *Bates* v *State Bar of Arizona*, 433 US 350, 364-365). In a market system such as ours, allocation of resources is largely accomplished through a confluence of private economic decisions. Society possesses a vital interest in ensuring that these economic decisions are consummated in an intelligent, well informed atmosphere, and the free flow of commercial information is indispensable to the attainment of this goal (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council, supra*, at p 765).

The individual consumer, too, has a stake in the availability of commercial information. To many, knowledge of the price and availability of goods and services takes on an importance overshadowing even the most urgent political debate. Especially in these days of rapidly fluctuating prices, the free flow of commercial information plays a central role in consumer decision making. Indeed, it could mean the difference between enjoyment or nonenjoyment of basic necessities (see, *Va. Pharmacy Bd.* v *Va. Consumer Council, supra*, at p 764).

Recognition of these interests accounts, in large measure, for the protections extended commercial speech. In a competitive market, information concerning the availability and price of goods and services is essential to consumers. Analysis of precedent bears out this observation. In *Va. Pharmacy Bd.* v *Va. Consumer Council* (425 US 748, *supra*), for example, the State sought to prohibit advertising of prescription drug prices. Acknowledging the State's strong interest in ensuring the professionalism of pharmacists, the Supreme Court nonetheless found the societal and individual benefits flowing from price advertising in this competitive industry to be superordinate: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. * * * But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering" (Id., at p 770). Similarly, in *Bates* v. *State Bar*

of Arizona (433 US 350, *supra*), a disciplinary rule restricting advertising by attorneys was invalidated. In so doing, the court again highlighted the role of commercial information in a free enterprise economy, commenting that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking" (Id., at p 364). The various justifications offered in support of a ban on attorney advertising were deemed insufficient to override these interests (Id., at pp 366-379).

By the same token, where the importance of the free flow of commercial information is diminished, either because of market structure of the industry or hazards associated with a particular means of communication, First Amendment protection reaches its nadir.[2] This dichotomy is aptly illustrated by *Ohralik* v. *Ohio State Bar Assn.* (436 US 447, *supra*), where a prohibition of in-person solicitation by attorneys was upheld. *Ohralik* recognizes the " 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." For this reason, commercial speech occupies a "subordinate position in the scale of First Amendment values" (Id., at p 455-456). Thus, a particular mode of advertising which would not well serve the societal interest in informed decisionmaking, such as in-person solicitation, may constitutionally be banned: "In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services * * * it actually may disserve the individual and societal interest * * * in facilitating 'informed and reliable decision-

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[2] We are not suggesting that the fate of a business entity's First Amendment rights turns upon its economic self interest (see *First National Bank of Boston* v. *Bellotti*, 435 US 765). To the contrary, petitioners' economic interest would be well served by promotional advertising. Rather, it is the beneficial or detrimental impact of commercial information upon society which assumes importance on analysis.

making' " (Id., at pp 457-458). Such speech, *Ohralik*, teaches, may be prohibited in the public interest.

Applying these principles, the ban on promotional advertising of electricity is consistent with First Amendment strictures. Public utilities, from the earliest days in this State, have been regulated and franchised to serve the commonweal. Our policy is "to withdraw the unrestricted right of competition between corporations occupying * * * the public streets * * * and supplying the public with their products or utilities which are well nigh necessities" (*People ex rel. New York Edison Co.* v *Willcox*, 207 NY 86, 99; *Matter of New York Electric Lines Co.*, 201 NY 321). The realities of the situation all but dictate that a utility be granted monopoly status (see *People ex rel. New York Electric Lines Co.* v *Squire*, 107 NY 593, 603-605). To protect against abuse of this superior economic position, extensive governmental regulation has been deemed a necessary coordinate (see *People ex rel. New York Edison Co.* v *Willcox, supra*, at pp 93-94).

In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping. At best consumers may seek, through the Public Service Commission, to limit future increases in electrical prices. Surely promotional advertising would provide no information of assistance in this respect.

Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy

crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Accordingly, the order of the Appellate Division in each case should be affirmed, with costs.

* * *

In each case:

Order affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Decided May 1, 1979

Appendix B

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, July 27, 1978

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

No. 33186
In the Matter of

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

No. 33185
In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORP.,
Respondent-Appellant,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant-Respondent.

Appendix B

APPEAL from a judgment of the Supreme Court at Special Term (Roger J. Miner, J.) entered March 6, 1978 in Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission and declared that the order was unconstitutional.

CROSS APPEALS from a judgment of the Supreme Court at Special Term (Roger J. Miner, J.), entered March 14, 1978 in Albany County, which granted in part and dismissed in part petitioners application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission.

* * *

PETER H. SCHIFF (Howard J. Read of counsel), for Public Service Commission, appellant, appellant-respondent, Empire State Plaza, Albany, New York 12223.

JOSEPH D. BLOCK, for Consolidated Edison Co. of New York, Inc., respondent, 4 Irving Place, New York, New York 10003.

GOULD & WILKIE (Davison W. Grant of counsel), for Central Hudson Gas & Electric Corporation, respondent-appellant, One Wall Street, New York, New York 10005.

LE BOEUF, LAMB, LEIBY & MACRAE (Ronald D. Jones, Andrew Gansberg and Howard S. Ockman of counsel), for National Fuel Gas Distribution Corp. and others, *amici curiae*, 140 Broadway, New York, New York 10005.

HARVEY J. SHULMAN, for Scientists' Institute for Public Information and others, *amicus curiae*, 1609 Connecticut Avenue, N.W., Washington, D. C. 20009.

* * *

GREENBLOTT, J.

We are here concerned with two separate appeals but because of the similarity of issues we are considering them together.

Appendix B

The first appeal concerns an order of the Public Service Commission (PSC) issued on February 25, 1977 which provided, in pertinent part, that "[a]ll utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". Petitioner, Consolidated Edison Company of New York, Inc. (Con Edison), challenged the validity of that portion of the order and Special Term annulled the order to the extent that it prohibited Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy. Special Term concluded that there was no basis in the statutory powers accorded the PSC which would authorize the total ban of such inserts. We disagree.

The PSC has general powers of supervision and regulation over activities of gas and electric utilities. (See, e.g., Public Service Law, §66.) The issue before us is whether, given these powers, the PSC may prevent management from expressing its political positions in a manner that is inevitably subsidized by the consumer, particularly when the PSC places no restrictions on advertisement by any other means. We hold that it may.

Con Edison does not dispute that the PSC has a duty to allocate costs for political advertising to accounts chargeable to shareholders (16 NYCRR chap. III, subchap. F, account 426.4). An obvious corollary of this duty is the requirement that consumers not be charged with the costs of these political activities. The PSC necessarily has the duty to protect consumers from such charges.

The PSC protests that, given the manner of airing its views chosen by Con Edison, it cannot fulfill that duty. We agree that it would be impossible to separate out the costs attributable to mailing the bills (a customer expense) from the costs attributable to mailing out management statements (a shareholder expense). Unless the PSC allocates all the costs of mailing as well as costs of stuffing the envelopes to the utility, management will benefit from a savings in postage and labor, a subsidy the PSC is empowered to prevent. That the mailings would not cost the consumers anything is irrelevant since the issue is whether

management's costs will be reduced through customer subsidy. In the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses.

We also reject the argument that the order is a violation of the utilities' free speech rights. Since the PSC's authority to issue the order and the necessity for doing so have been established, it is only a serious infringement of petitioner's constitutional rights that would warrant our annulment of the order. Here, there is no order barring Con Edison from expressing its opinions, nor is there an order barring the company from using the usual forms of advertisement. There is merely an order prohibiting the use of bill inserts to put forth management positions. This insignificant impingement on petitioner's rights is far outweighed by the PSC's duty to prevent customer subsidy of management's pamphleteering.

Nor do we view the order as being fatally vague. The order restricts only the utility's use of the bill insert to express its "position on controversial matters of public policy". The boundaries of the order need not be defined with utmost exactitude. We have little doubt that the PSC and the utilities are capable of distinguishing useful information for consumers (e.g., ways to conserve energy) from management's statements on the political issues of the day (e.g., benefits of nuclear energy). Further, the order clearly contemplates expenditures that would qualify under account 426.4 of the PSC's accounting guidelines (16 NYCRR, chap. III, subchap. F) as expenditures to influence public opinion. This is as detailed a statement of the contours of the order as the Constitution requires. Thus, the judgment entered March 6, 1978 must be reversed.

In the second appeal petitioner Central Hudson Gas & Electric Corp. (Central Hudson) cross appeals from a judgment of Special Term insofar as the court dismissed its application to vacate that part of the order of the PSC issued on February 25, 1977 which classified expenses for advertising designed to sway public opinion as nonoperational and, therefore, chargeable to shareholders and which prohibited promotional advertising by electric utilities. For the reasons hereinbefore mentioned so much of the judgment as annulled that portion of the PSC order banning

the use of bill inserts as a means of disseminating the utility's position on controversial matters of public policy should be reversed.

Concerning the prohibition of promotional advertising Central Hudson initially argues that no statutory authority empowers the PSC to order such a prohibition. The PSC relies on its statutory obligation to assure that rates charged are just and reasonable (Public Service Law, §66) and upon section 5 (subd. 2) of the Public Service Law which requires the PSC to encourage corporations subject to its jurisdiction "to formulate and carry out long-range programs individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources". In justification, the PSC concluded that promotional advertising will increase the use of electricity causing spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity; that such advertising provides misleading signals that energy conservation is unnecessary; and that additional usage will increase the level of dependence on foreign sources of fuel oil. Considering the impact of promotional advertisement, the PSC is, in our view, statutorily empowered to prohibit such advertisement (Public Service Law, §66; §5, subd. 2).

Central Hudson also argues that the prohibition violates its right to free speech as guaranteed by the First Amendment to the United States Constitution. The Supreme Court has held that commercial speech falls within the protection of the First Amendment (*Virginia Pharmacy Bd.* v *Virginia Consumer Council,* 425 US 748). More recently, in a case where a prohibition was directed at speech itself, the Supreme Court held that the prohibition must be supported by a showing of a subordinating interest which is compelling and the burden is on the government to show such an interest (*First National Bank of Boston* v *Bellotti,* US ——, 98 S Ct 1407). Upon our review of the record, it is the opinion of this court that the PSC has sufficiently demonstrated such an interest and, therefore, the prohibition of promotional advertising is not violative of Central Hudson's First Amendment right to freedom of speech.

Appendix B

Expenditures for political and related advertising activities have normally been excluded from operational expenses in the ratemaking process and consequently have been chargeable to shareholders rather than ratepayers (16 NYCRR chap. III, subchap. F, account 426.4). Central Hudson, however, argues against the expansion by the PSC of the definition of political and related advertising activities to include "all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes". Specifically included in this category by the PSC were expenses incurred in advertisements designed to influence public opinion concerning the development of nuclear energy. We agree with Special Term that the PSC may properly classify such expenditures pursuant to its rate regulating activities and that the expanded definition propounded by the PSC is not overly broad, arbitrary or capricious (see *Southwestern Elec. Co.* v *Federal Power Comm.*, 304 F2d 29, cert. den. *sub nom Alabama Power Co.* v *Federal Power Comm.*, 371 US 924). We also find no constitutional infirmity in such categorization.

The judgment entered March 6, 1978 should be reversed, on the law, without costs, and the order declared constitutional.

The judgment entered March 14, 1978 should be modified, on the law, by deleting so much thereof as annulled the PSC's directive; determination confirmed, and, as so modified, affirmed, without costs.

SWEENEY, J. (concurring in part and dissenting in part).

We respectfully dissent from that part of the majority's decision that holds that the Public Service Commission (PSC) is authorized to restrict political inserts in billing envelopes.

The PSC has only those powers conferred upon it by the Legislature and such additional powers as are incidental thereto or necessarily implied therefrom (*Matter of New York Tel. Co. v Public Serv. Comm. of State of N.Y.*, 59 AD2d 17). Two provisions of the Public Service Law are proposed by the PSC as authority in support of the ban in question. Initially, it is urged that section 65 (subd. 3) of the Public Service Law is violated

by the use of bill inserts in that it gives the managements of the utilities a benefit or advantage unavailable to others. It is clear, however, that section 65 (subd. 3) relates to the prohibition of discrimination in the provision of services and no such discrimination is present in the instant case.

It is also argued by the PSC that section 66 (subd. 2) of the Public Service Law authorizes the ban on bill inserts as that section empowers the PSC to "order such reasonable improvements as will best promote the public interest". In support of this argument, it is contended that the order in question is designed to protect utility subscribers generally from the conversion of the billing process into a subsidized forum for the dissemination of management's political views. The majority adopts the position of the PSC that the bill inserts would be inevitably subsidized by the consumer and consequently finds authority in the PSC to prohibit the use of bill inserts. In our view, however, it would not be impossible for the PSC to perform its duty of allocating the cost of these management statements to accounts chargeable to shareholders. We find nothing to prohibit the PSC from proportioning the costs so that the cost attributable to the placing of the bill inserts in envelopes and the mailing of the bill inserts would be chargeable to shareholders rather than ratepayers. Such an apportionment would prevent the subsidizing of management's views through the use of bill inserts. Consequently, we find no express or implied statutory power authorizing the PSC to ban the bill inserts prohibited by its order of February 25, 1977. We would, therefore, affirm both of the judgments here on appeal.

MAHONEY, P.J., and MIKOLL, J., concur with GREENBLOTT, J.; SWEENEY and MAIN, JJ., concur in part and dissent in part in a separate opinion by SWEENEY, J.

Judgment entered March 6, 1978 reversed, on the law, without costs, and order declared constitutional.

Judgment entered March 14, 1978 modified, on the law, by deleting so much thereof as annulled the Public Service Commission's directive; determination confirmed, and, as so modified, affirmed, without costs.

Appendix C

Opinion of the New York Supreme Court, Albany County, February 17, 1978

STATE OF NEW YORK

SUPREME COURT: COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION.
Petitioner,

-against-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.
Respondent,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court, Albany County Special Term, December 9, 1977
Justice Roger J. Miner, Presiding

Calendar No. 50

APPEARANCES:

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Appendix C

MINER, J:

On February 25, 1977 the respondent issued its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" and "Order Implementing Certain Restrictions on Utility Advertising." In this proceeding pursuant to CPLR Article 78 petitioner challenges three aspects of the policy statement and implementing order: a) the prohibition upon the use of bill inserts to disseminate the views of utility management on controversial matters of public policy; b) the prohibition upon promotional advertising: c) the respondent's definition of political advertising.

The issues raised by the prohibition upon the use of bill inserts are addressed in a separate opinion issued by this court simultaneously herewith. (*Matter of Consolidated Edison* v *Public Service Commission.*) For the reasons set forth in that opinion, this prohibition is invalid.

Petitioner claims that the ban upon promotional advertising by electric utility companies is a violation of its First Amendment rights under the United States Constitution. Although commercial speech is constitutionally protected, it may be regulated to promote a significant governmental interest. (*Va. Pharmacy Board* v *Va. Consumer Council,* 425 US 748, 48 L. ed. 2d 346: *The Suffolk Outdoor Advertising Co.* v. *Hulse et al,* —— NY2d ——, decided December 21, 1977.) Such an interest exists here. Respondent has determined that the promotion of electricity would increase the costs of providing electric service, causing an adverse impact upon electric rates. Respondent found that even the promotion of off-peak usage would, because of inefficient rate structure, encourage usage not properly priced and economically inefficient. Respondent is charged with the duty of assuring that rates charged are just and reasonable. (Public Service Law, §66; 48 NY Jur., Public Utilities. §61.) The prohibition upon promotional advertising has a rational basis related to respondent's rate regulating responsibilities and advances a significant public interest. (*Linmark Associates, Inc.* v

Willingboro, 431 US 85, 52 L. ed. 2d 155; *Matter of Pell* v *Board of Education*, 34 NY2d 222.)

Expenditures for political and related activities are required to be recorded "below the line" in a non-operating account and therefore are chargeable to shareholders rather than ratepayers. (16 NYCPR Ch. II, Subch. F, Art. 1, Accounts, 426.4.) Respondent may properly classify such expenditures in connection with its rate regulating activities. (*Southwestern Electric Power Co.* v *FPC*, 304 F2d 29, cert. den. 371 US 924.) In its statement of policy respondent has included in its definition of political and related activities ". . . all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes." (p. 10). Specifically included was advertising designed to influence public opinion respecting the development of nuclear power. The court finds that the definition adopted by respondent is not overly broad, arbitrary or capricious. The positions taken by petitioner to sway public opinion may be advertised and the standard established for determining the allocation of the cost thereof has been clearly established by respondent. Although public utility regulators in other jurisdictions may have determined that expenditures for certain advertising falling within the PSC definition of political activity are properly charged to operational expenses for rate making purposes, the court finds that respondent's determination was not an abuse of discretion here.

Submit judgment consistent herewith.

Dated: February 17, 1978.

All papers to the attorney for respondent.

Appendix D-1

Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy, December 5, 1973

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 4, 1973

COMMISSIONERS PRESENT:

William K. Jones, Deputy Chairman
Edward P. Larkin, dissenting
Carmel Carrington Marr
Harold A. Jerry, Jr.

CASE 26532—Proceeding on motion of the Commission to conserve fuel used in the production of electric energy.

NOTICE OF PROPOSAL TO ISSUE ORDER

RESTRICTING CERTAIN USES OF ELECTRIC ENERGY
(Issued December 5, 1973)

BY THE COMMISSION:

As has been made clear in recent weeks, the demands for electric energy in this State cannot be met for the foreseeable future without significant reductions in usage in view of the lack of sufficient fuels to generate electricity. The most critical fuel shortage in terms of electric generation exists with respect to residual fuel oil. About 40 percent of the residual oil consumed in New York State is refined from crude oils imported from Arab states in the Middle East and North Africa. Parts of the State are more than 50 percent dependent on Arabian-based residual oil. Much of this supply is no longer available in view of the embargoes imposed by those nations; moreover, for the foreseeable future substitute supplies are not obtainable from other sources. We should make clear, however, that while these embargoes have aggravated the situation, a fuel shortage, particularly of fuels conforming to sulfur requirements under air quality standards for the metropolitan New York City area, was imminent in any event.

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The supply of natural gas has also been deficient for a number of years, and, despite restrictions imposed on its sale, the coming heating season will see even shorter supplies available in New York. In addition, while there is an adequate amount of coal resources in the United States, the current production would not be sufficient to substitute fully for deficiencies expected in other fuels.

As a direct result of these shortages, the interconnected electric utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter. If the State system were forced to operate at normal levels throughout the current heating season, there is a likelihood that service would have to be drastically curtailed at some point, including periods of no service at all to some or many customers, because of an inability to replenish fuel supplies.

In light of this impending emergency, we view it as our obligation under the Public Service Law to take reasonable steps to enable the electric companies to continue providing essential service. At this juncture, increasing capacity is not the answer because of the immediacy of the problem and the shortage of fossil fuels to power new sources of generation. By reducing power demand we can, however, exert the direct control necessary to avert a disaster. In addition, fuel savings can be achieved, although at the expense of overall electric reliability, by requiring utilities to operate at reduced voltages.

While voluntary measures to reduce energy consumption have been undertaken as a result of appeals from the President and other officials, we have concluded that a number of mandatory restrictions on electric consumption should also be imposed as quickly as possible. Such restrictions are essential to husband supplies of fuel so as to permit generation of electricity for the most essential uses.

The Commission has received a large number of recommendations for optimizing the use of available fuel supplies for

necessary power purposes in times of crises. Among these recommendations are prohibitions or restrictions on certain uses which may be considered wasteful or nonessential in the present circumstances. Such uses include outdoor display, private and other decorative lighting and advertising lighting, commercial window display lighting and outdoor decorative fountains, electric ground level snow melting equipment, and heating and lighting in buildings during times when such buildings are not in use.

We consider outdoor display, private and other decorative lighting and advertising lighting to include all outdoor lighting other than highway, street, driveway, walk and parking lot lighting, safety lighting, and illumination of signs needed to identify business establishments during their hours of operation.* Except as needed for identification, the marquees of any place of entertainment shall be considered an advertising sign. Where light from other sources is insufficient to allow the reading of the lettering on the marquee from the nearest street or road, an application for relief may be made to the Commission.

At this time of the year in particular, outdoor display and advertising lighting and decorative fountains can consume large amounts of electric energy, and create the false impression that there is no shortage of the fuels needed to generate electricity. Energy conservation is discouraged by such lighting.

The same is true where commercial office buildings and parking lots are left with lights burning long after offices have ended the day's operations, which includes after-hours cleaning.** The level of light necessary for reading and other work during business hours would be wasteful of substantial amounts of power

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* A sign shall generally be regarded as "needed to identify a place of business" where there is no more than one sign, showing the name of the establishment and type of business only, visible on each building side which contains an entrance for use by the patrons of the establishment.

** The proposed conditions assume that such cleaning would require no more than three hours.

if maintained overnight and would afford no benefit after business hours.

Similarly, heating in commercial buildings need not be maintained after the day's operation at the same temperature maintained during business hours. Space heating thermostat setback to 55°F and the shutdown of air conditioning equipment in unoccupied areas of buildings would conserve a great deal of energy.

Electric snow melting equipment, while providing great convenience, consumes a great deal of energy and is generally not essential. If service is denied for such equipment we foresee no particular hardship ensuing. Should any occur, application for relief may be made to the Commission.

In light of these findings we intend, absent good cause otherwise shown, to direct the electric utilities of this State to file tariff leaves shortly after the date hereinafter specified adopting the substance of the following conditions for the supplying of electric service.

1. No customer shall utilize electric power for outdoor display, private or other decorative or advertising lighting as defined hereinabove or outdoor decorative fountains at any time. In addition, after regular business hours of the customer or establishment maintaining signs, no customer shall use electric power for the purpose of illuminating any sign other than exit signs, and safety or emergency signs.

2. Commercial window display lighting may not be used after 9:30 p.m. or after the close of business, whichever is later.

3. No commercial office building customer shall allow parking lot lighting or interior lights, other than those required for overtime work, safety or security, to remain on more than three hours after the close of business hours of such customers. When working hours differ among offices within a building, electric lights shall be turned off in each office within three hours after the regular closing time of that office, if separate lighting circuits

are available. Lights shall not be turned back on until the start of business hours the next morning in such offices or office buildings.

4. In every commercial building, space heating thermostats shall be set at no more than 55°F, and air conditioning units shall be switched off, during nonbusiness hours except for areas having essential, special requirements or special processes that are in operation. The provision should not be construed to prohibit heating up to 68°F in small areas occupied by watchmen, in areas where after-hours cleaning operations are carried out or to assure such temperature in time for the opening of the business day.

5. Electric ground level snow melting equipment may not receive electric service, except that cases of special hardship may be appealed to the Commission.

6. If a customer shall violate any of the above-mentioned provisions, the electric corporation serving that customer shall, upon five days' written notice, discontinue all electric service to the customer. In the event violations are committed in a building in which more than one tenant, or one or more tenants and the landlord, are served through the same meter, the utility providing service shall not discontinue service without first notifying the Commission.

In addition, the Commission is considering the possible use of voltage reductions, either downstate or statewide, to enhance the conservation of scarce petroleum fuels. Staff estimates that a five percent reduction might produce an energy saving of about two percent of load. The energy saving is not directly proportional to the voltage reduction, since some types of load, such as electric motors, would continue to use about the same amount of energy on a constant basis and in other cases the length of the process, such as cooking, would merely increase with about the same total use of energy.

The use of voltage reduction is not, however, without risk. The ability to reduce load quickly by 5 percent voltage reduc-

tion is an important tool for the system dispatcher when he must meet sudden emergencies involving lack of capacity. To the extent that the tool has already been used, he must turn to other, perhaps more drastic, expedients. Moreover, we are concerned that prolonged voltage reductions may have an adverse effect upon the functioning or durability of motors and certain other types of electrical equipment. To date, most of our experience with voltage reductions has been with limited time periods.

We propose to order a voltage reduction in all areas of the State with these exceptions: (1) Voltage should not be reduced on a specific circuit where to do so would result in an unusable voltage. As to any such circuit, the utility concerned shall promptly file a program for upgrading the circuit. (2) Voltage need not be reduced in an area where voltage reduction would not facilitate oil conservation because of the nature of local electric generation and limitations on transmission line capacity.

We have considered whether the voltage reduction should be employed only over the hours of daily peak load, such as from 2 p.m. to 8 p.m., or continuously over all 24 hours of the day. While the exact difference in savings cannot be predicted, it may be estimated that a four-hour schedule on-peak would save a very substantial portion of the total that could be realized by continuing the voltage reduction for the entire 24 hours. Balancing the fuel savings and the inherent risks of voltage reduction, it is our present intention, absent good cause otherwise shown, to require operation at reduced voltages throughout the State for the periods from 2 p.m. to 8 p.m. As an alternative, for areas with supervisory control of voltage levels, we are considering ordering voltage reductions in three four-hour periods: 8 a.m. to 12 noon; 2 p.m. to 6 p.m.; 8 p.m. to 12 midnight.

Finally, it seems clear that in the present circumstances there is no reasonable basis for any continued promotion of electric usage by any utility subject to our jurisdiction through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives.

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The Commission orders:

1. That unless good cause is shown by writing received at the office of this Commission at 44 Holland Avenue, Albany, New York 12208 not later than December 14, 1973, the Commission will direct the electric corporations serving customers in New York State to file tariff leaves containing the hereinabove described restrictions on electric service, and will order a statewide five percent voltage reduction during the period 2 p.m. to 8 p.m. each day until further notice except in the special circumstances discussed above.

2. All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising, subsidy payments not committed prior to the date of this order, or employee incentives.

3. That each electric corporation shall immediately cause the proposals contained in this order to be published in at least two newspapers of general distribution in each territory served by that corporation.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

Appendix D-2

Statement of Policy on Advertising and Promotional Practices of Public Utilities

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

STATEMENT OF POLICY
ON ADVERTISING AND PROMOTIONAL
PRACTICES OF PUBLIC UTILITIES

Issued: February 25, 1977

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STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Alfred E. Kahn, Chairman, concurring in part and dissenting in part
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead, dissenting in part
Charles A. Zielinski

STATEMENT OF POLICY
ON ADVERTISING AND PROMOTIONAL PRACTICES
OF PUBLIC UTILITIES

(Issued February 25, 1977)

BY THE COMMISSION:

On July 28, 1976, we issued a notice of proposed policy statement and requested comments on the subjects of advertising by utilities and the promotion of electricity sales. We indicated our intention to reexamine subjects covered in our 1972 policy statement on these matters[1] in light of contemporary conditions. We asked interested parties to comment on the items discussed in the proposed policy statement and to offer alternative suggestions on these issues if they so desired.

Over 300 responses to our notice were received. Many of these were brief statements of position from individual consumers; others, including those from most of the utilities, consumer, environmental and other special interest groups, were more comprehensive in scope. Because of the great number of responses,

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[1] *Statement of Policy on Advertising and Promotional Practices by Public Utilities,* 12 NY PSC 108-R (issued June 21, 1972).

no attempt will be made in our discussion to identify the particular views of individual respondents. It is worthy of special mention, however, that we found the responses extremely valuable. They were all carefully considered and evaluated in reaching decisions on the issues presented in our notice.

Although the amount of money spent on advertising by major utilities in this State is a very small portion of their total revenues, the proper extent and content of such advertising and the ultimate responsibility for its cost is an increasingly controversial issue. This Commission has routinely monitored the advertising practices of New York utilities within the framework of the Uniform System of Accounts and the guidelines for rate treatment of these expenditures set forth in our 1972 policy statement, as subsequently amended in individual rate proceedings. Thus, we have established a system of regulation which has provided reasonable assurance that even the minor amounts expended are properly accounted for, so that we can determine whether utility rates reflect only reasonable amounts, expended for proper purposes.

Our 1972 policy statement was issued at a time when the telephone industry was beset with significant service problems, since largely overcome, when the emerging gas supply shortage was first recognized and, of perhaps greatest importance, before the 1973 oil embargo which resulted in severe fuel oil shortages and sharply increased oil costs. While we have, through individual rate and other orders, amended the provisions of the 1972 policy statement where necessary to meet these changing conditions, we have during the past year felt it desirable to have a fresh look, in integrated fashion, at the totality of issues associated with utility company advertising and promotional practices, in the light of circumstances of 1976 and 1977.

Advertising expenses may be subdivided into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.

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Promotional Advertising[1]

(1) *Electricity*

The 1972 policy statement contained no restriction on the promotional advertising of electric utilities, explicitly recognizing that those companies had exercised self-restraint in these efforts, most of which were limited to development of off-peak loads. Shortly after the oil embargo, and in response to the reductions in oil supplies, we prohibited the promotion of the use of electricity through advertising or the provision of subsidy and incentive plans. That ban is still in force.

In our July 28, 1976 notice, we requested comments on a proposal to lift the flat ban against sales promotion by electric companies. We listed several competing considerations, some arguing for extension of the ban and others for its relaxation.

Of the responses received on this specific matter, a large number of parties suggested that electric companies be permitted to develop off-peak loads. In addition to the benefits of a limited relaxation that were mentioned in our notice, many of these parties pointed out that development of off-peak load would likely result in a lowering of the unit cost of electricity, due to a greater utilization of existing plant, with a resulting downward pressure on, or at least a stabilization of, present rates. Others observed, as we did in our notice, that where electricity competes with oil, promotion of electricity, if generated incrementally from coal or uranium, could confer the additional benefit of making this country more independent of foreign oil supplies in those cases where oil is the primary competitive fuel.

We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous

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[1] In addition to establishing the policy set forth below, we will require strict adherence to the accounting classifications of this type of advertising as set forth in the Uniform System of Accounts prescribed for electric, gas and telephone utilities. See Resolution of the Commission: Amendment of 16 NYCRR, Chapters II, III and VI, Article 1, adopted October 24, 1973.

ways. Increased off-peak generation, however, while conferring some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

We conclude that the existing ban on promotion of electricity sales should be continued. We recognize, however, that as we move toward more and more widespread adoption of time-of-day rates, it may be highly desirable for companies to publicize those rates, and point out the various ways in which customers may take advantage of them. While this advertising may better be described as informational, we wish to make clear, in any case, that it is our desire to permit advertising of this kind, provided it has the exclusive, or at least preponderant effect of encouraging *shifts* of consumption from peak to off-peak and little or no effect of increasing aggregate sales. For

these reasons, we will remain prepared to approve specific proposals by the companies for specifically described programs that meet these criteria. We shall reexamine from time to time our determination to continue, with the limited exception for publicizing time-of-day rates, the ban on promotional advertising should conditions change sufficiently to warrant such a reevaluation. Further, we shall continue to maintain surveillance of all advertising activities engaged in by electric utilities, and where deviations from the requirements of our order are found, we will take remedial action, including adjustments in rate cases, to bring about compliance.

(2) *Gas*

Because of the then emerging and increasingly severe shortage of natural gas, on October 26, 1971,[1] we ordered all gas companies (with the exception of several small companies specially situated) to limit the attachment of new gas customers and the expansion of gas service to existing customers.[2] That order also provided:

> Effective January 1, 1972, all gas distributors subject to the restrictions imposed herein shall cease all promotional activities designed to acquire new gas customers or increase sales of gas to existing customers. Except to the extent indicated below, such prohibition shall apply to all advertising employing mass media, all bill inserts or other direct mailings to customers or others, and all calls by salesmen seeking to obtain or arrange "conversions" to gas space heating or to sell or promote the sale of gas appliances. The prohibition does not apply to:
>
> (a) Service calls to repair existing gas equipment, recommendations relating to the replacement of such equipment, and information relating to such replacement.

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[1] Case 25766, the *Gas Restriction Case,* 11 NY PSC 1257.

[2] Case 25766, the *Gas Restriction Case,* 11 NY PSC 1257.

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(b) Advice directed to existing customers as to how they may achieve the best heating and safety results with respect to existing gas equipment. Use of the mass media or unselective mailings are not an acceptable means of accomplishing this objective.

(c) Direct contact with existing or potential customers for the purposes of encouraging the installation of dual-fuel equipment.

(d) Individual responses to inquiries received by a gas company without prior solicitation.

These provisions were incorporated into our 1972 Policy Statement and remain in effect. We have reexamined these requirements in light of current conditions and conclude that, for the most part, they should remain unchanged. We are, however, concerned about the exception granted in item (c) above. Because additional demand for gas can be created as a result of direct contact with potential customers for the purpose of encouraging the installation of dual-fuel equipment we will no longer consider this a permissible activity by gas utilities. Of course, the companies may continue to encourage their existing gas customers to install alternate fuel equipment. In addition, in view of the deepening gas supply shortage, and the essentiality of inducing all customers to conserve, we will no longer permit promotional activities designed to retain existing customers at previous levels of consumption, except in those limited instances where gas companies are permitted to attach new residential load to offset a decline in firm load.

All other provisions of our previous order will remain in effect, as to each gas company covered. Exceptions to this policy may be granted provided a company can clearly demonstrate that it has firm supplies of gas, for the present and near future, sufficient to permit it to engage in some limited form of promotional activity without lessening the supply of gas available to existing customers.

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As long as the shortage of natural gas continues, we shall maintain close surveillance of advertising and other promotional activities of gas companies. We shall also continue to require prior submittal of the promotional plans of gas utilities seeking to deviate in any way from our order in Case 25766 as amended here.

(3) *Telephone Companies*

On February 11, 1970, we directed New York Telephone Company to "cease all promotional advertising and all other promotional activities designed to attract additional subscribers or otherwise to increase telephone usage until such time as the company's capacity to provide service exceeds busy-hour requirements throughout the state, except for local promotions in areas where ample capacity exists." Case 25290, *New York Telephone Company Service Case,* First Interim Order, 10 NY PSC 93. Since adoption of this order, New York Telephone Company's capacity to provide service has improved to the point where it now exceeds busy-hour requirements throughout the state. By order issued in Case 25290 on March 13, 1973, 13 NY PSC 461, we relaxed the promotional advertising restrictions previously imposed "provided that the company will insure that the service sought to be promoted will not burden the subscriber body with an increase in average costs, but rather will tend to reduce the burden of cost which must be supported by the average subscriber."

While the interim order in Case 25290 was outstanding, we considered whether the promotion of yellow pages should also be restricted and we concluded that it should not. Yellow pages promotion may increase telephone usage to some extent, but the major purpose of these directories is to facilitate more efficient use of the telephone by reducing calls to information or to parties unable to assist the caller.

We shall continue the policy on telephone promotional advertising that is now in effect. Promotional advertising by New York Telephone Company, or by other telephone companies, including

radio-telephone utilities, will be carefully scrutinized to assure (1) that adequate capacity exists to provide the service sought to be promoted without adversely affecting existing subscribers; and (2) that the advertising expenditures themselves together with the expansion of the service which they seek to promote will tend to reduce rates for telephone service.

Institutional Advertising

In addition to seeking to promote sales, utilities (like other businesses) engage in "institutional advertising"—a rather amorphous phrase covering all advertising which is not sales promotional in nature. Although our staff has employed some relatively useful tests in reviewing expenditures for this kind of advertising,[1] the very imprecision of the definition has caused substantial controversy in our proceedings about whether certain kinds should be recovered in rates. Therefore, we believe there is a clear need to reexamine this area, and to establish a policy for treatment of related expenses in rate cases. We consider separately two categories of institutional advertising: (1) civic, political and related advertising activities, and (2) informational and other institutional advertising.

Civic, Political and Related Advertising Activities

It is generally accepted that advertising which states a utility's position on a matter of public controversy necessarily reflects the political views or self-interest of managements or shareholders and should not be borne by ratepayers, whose views or interests may differ. Thus, political advertising—in support of, or opposed to, governmental action of any kind—will not be considered a legitimate cost of doing business for the purpose of determining rates. See *Complaint of Grassroots Action, Incorporated,* Case 26315, April 18, 1973, 13 NY PSC 630. Our amended Uniform System of Accounts reflects this view. All political advertising is required to be recorded below the line in nonoperating expense account No. 426.4. Expenditures recorded in this account are routinely excluded in the ratemaking process.

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[1] *E.g.,* "Is the advertising clearly beneficial to consumers?"

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Our decisions in two recent cases notwithstanding,[1] we shall also include in the category of political and related activities, and therefore payable by stockholders, all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes. Utilities, of course, have the right to publish their thoughts on vital issues concerning their operations, but, upon consideration of the comments received in response to our notice, we are now persuaded that it is unfair to impose the cost of disseminating those thoughts onto ratepayers who may or may not agree with them. The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate; but we believe that it is basically unfair to assess against ratepayers the cost of advertisements urging the adoption of positions with which they may disagree. Therefore, we will no longer sanction the use of sums provided by ratepayers to advance one side of a public controversy. We include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power. We do not seek by this action to inhibit or discourage participation by utilities in public debates of issues that vitally concern them: we recognize and endorse their right to do so. We simply believe that it is wrong to expect ratepayers to finance that participation.

Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it

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[1] Case 26848, *Rochester Gas & Electric Corporation* (Opinion 76-8, issued April 8, 1976) and Case 26887, *Long Island Lighting Company* (Opinion 76-11, issued May 28, 1976).

is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

Informational and Other Institutional Advertising

Some forms of utility institutional advertising clearly are in the public interest and their costs are a legitimate expense of doing business. These include appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. Expenses incurred by utilities for this type of advertising are clearly properly recoverable in rates.[1]

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[1] In addition to purely informational advertising, those advertising costs attributable to a utility's effort to upgrade the residential and industrial potential of its franchised territory and to improve the area's overall economic condition are properly recoverable. Advertisements extolling the desirability of the area as a location for job-creating industry would, if successful, benefit all of the utility's customers. Whatever its possible effects on utility rates, its benefits for the economy of New York State clearly makes such advertising a fully acceptable activity by utility companies.

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There is, in addition to purely informational, a large middle ground of institutional advertising that falls somewhere between that clearly beneficial to customers, and that which is clearly political or controversial. There is advertising, for example, in which a company defends, justifies, or even merely explains and describes its activities. It might be argued, on the one hand, that there is no reason for ratepayers to bear the costs of such self-justification; that it is not of direct usefulness to them. On the other hand, it is extremely difficult to argue, especially now when public utilities are subjected to frequent public attack and criticism, that these are not, within limits, legitimate and indeed inescapable costs of doing business in today's conditions. It is unreasonable not to afford utility managements under attack an opportunity to explain and justify themselves. It might be argued, of course, that since such expenditures are on behalf of the companies rather than in the direct service of their ratepayers, they ought to be paid for by the shareholders. But if they *are* inescapable costs of doing business, and if, as is our policy, we allow shareholders returns only at the minimum level necessary to attract capital, then at least in principle if we were nominally to disallow these expenditures from rates, we would have to provide a correspondingly larger return on equity.

Our experience demonstrates that the time spent by our staff in ferreting through innumerable vouchers of institutional advertising is far out of proportion to the dollar amount of expenses found in that process to be unacceptable for rate purposes. For example, in the year 1975, *all* advertising costs spent by the seven largest privately owned electric, gas and steam utilities in New York State amounted to $3,370,000. Since the utilities received $5,280,264,000 in revenues for that year, the advertising costs equated to 6/100 of 1% of those revenues: six cents on *all* forms of advertising for every $100 in revenues received. It follows that since institutional advertising of a questionable nature is only a part—and typically a very small part—of total advertising, its impact on rates would be very slight indeed. It is obvious that any benefits gained from close, individual examina-

tion of these insignificant costs must be outweighed by the costs of their examination.

It is for these reasons that we have decided to allow companies a very small pool of dollars in rates to cover both informational and the intermediate category of "other institutional" advertising. On the basis of past practice, this allowance will, in all probability, range between 1/10 and 1/25 of one percent of operating revenues, in inverse relationship to the size of the companies. It will be determined individually for each company, in its next or pending rate case,[1] on the basis of various other factors including size, geographical location, number of customers and costs of doing business in the area. Adoption of this modest lump sum advertising allowance approach will end the vexing and essentially arbitrary process our staff now engages in of reviewing all informational and other institutional advertising to decide whether specific expenses should be allowed or disallowed in setting utility rates.

This plan will obviously not solve all the problems we have described: we will still have to determine which advertisements are clearly political and/or self-serving, and specifically disallowed; and parties in rate cases would still be free to question the propriety of the lump sum allowance for the informational and other institutional advertising categories. On the other hand, it has the virtue of recognizing that some modest institutional expenditures, over and above those purely informational in nature, are an inescapable and legitimate cost of doing business, and get the Public Service Commission out of the business of an item-by-item content examination and evaluation of past advertisements—an activity in a sense redundant anyhow, in view of the fact that all we really do is set a reasonable level of rates for the future.

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[1] In pending cases where the hearings have been completed, parties may present their views on a proper lump sum institutional advertising allowance on brief.

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Our staff will maintain close and continuing scrutiny over the level of the lump sum advertising allowance for each company to assure that the amount provided is sufficient to cover only reasonable and necessary advertising costs consistent with this policy statement. We expect to review the policies set forth here periodically and to revise them when it seems desirable to reflect new or changed circumstances.

In the area of developing better public relations and avoiding obvious areas of customer dissatisfaction, utility managements are urged to give serious consideration to the clear labeling of the institutional advertising that will not be recorded as a cost of doing business for rate purposes. It is not in the interest of anyone to have institutional advertising exacerbate customer resentments at a time when large rate increases are made necessary by increases in various classes of costs beyond the control of utility management. Expenditures for institutional advertising *are* subject to management control and utility managements would be well advised, if the advertisement is either political or of a type not providing useful information to customers, to state in the advertisement itself: "The costs of this message are being borne by the company's stockholders and the expense will be excluded from consideration in any proceeding concerned with fixing the company's rates."

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

ALFRED E. KAHN, Chairman, concurring in part and dissenting in part:

I am for the most part in agreement with the conclusions we reach in this decision and the supporting argument, having participated actively in their formulation. At the same time, my views about our proper role in regulating the advertising policies of utility companies are sufficiently distinctive from those of my fellow commissioners to make me want to set them forth in my own words and over my own signature.

I begin by saying, in different words, what our opinion says: namely, that the many hours that we, our staff, the regulated companies and various intervenors devote to utility company advertising policies, and to deciding what portion of such expenditures are properly recovered in rates, are by any reasonable test a waste of time and ratepayers' money. These efforts must surely have the lowest benefit/cost ratio of any in which we engage; and the time inescapably devoted to them by our staff and commissioners would almost certainly have a much larger pay-back to ratepayers if it could be devoted to other endeavors—such as the further scrutiny of management efficiency, the formulation of more efficient rate structures, more intensive pressures on the companies we regulate to engage in load management and to encourage conservation. The heated discussions about advertising policy are, in other words, a tempest in a teapot, considering, first, the very, very small number of dollars at stake, and, second, the essential fraudulence of our purporting to exclude from rates expenditures for advertising that company managements will continue to feel it necessary to make: since we make every effort to set the allowable return

on equity at the minimum cost of capital, and most of the companies we regulate are not earning even that, in principle putting any advertising expenditures "below the line" can only mean, if we are honest, increasing the allowed return on equity, in order to enable these companies to raise the capital they need on reasonable terms.

For these reasons, I am particularly enthusiastic about our decision to provide companies with a very, very modest lump-sum allowance for institutional advertising. It is a first step in the direction of sanity, offering the hope of cutting down on the endless hours our staff has to devote to scrutinizing individual advertisements, then deciding and litigating whether they are properly includable in test-year expenses for rate-making purposes.

At the same time, there are many things we do and must do that cannot be said to pay off on a pure dollar and cents basis. If it infuriates some consumers to see some of their dollars—even if for each of them it means only a penny a year—spent to extol the benefits of nuclear power, or to induce them to purchase additional electricity or gas, or to make greater use of the communications facilities provided them by franchised monopolists, we must confront the question of principle, of whether we should be condoning this kind of use of ratepayers' dollars, even if the confrontation costs ratepayers more dollars than the companies spend in these questionable ways.

If it comes to questions of principle, however, there are more principles at stake than the Commission seems willing to recognize in its decision today, and it is these that I take the occasion of this partial concurrence and partial dissent to spell out.

Promotional advertising by electric companies

It is only with the greatest reluctance and distaste that I join my colleagues in continuing our absolute prohibition of promo-

tional expenditures by electric companies. While, as a non-lawyer, it has never been clear to me why the protections of the Fourteenth Amendment, which as a matter of historical fact was enacted to protect the rights of real, biological *people,* should necessarily have been extended to state-created artificial entities like corporations, I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective, some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one of whom is free to advertise his wares and the other is—under our present policies—not.

The issue of whether electric companies should be permitted to advertise (observe that the question before us is not whether those expenditures should be recovered in rates, but one, rather, of our totally prohibiting such activities) arises almost exclusively in the context of summer-peaking electric companies wanting to be permitted to promote electric space heating, which is for them essentially an off-peak use of power, with their principal rivals, the distributors of *heating oil,* vociferously importuning the Public Service Commission and the Legislature to prevent them from doing so. An idea is not necessarily a bad one merely because it is propounded by a scoundrel, or—as in this case—a businessman who wants to be relieved of the burdens of competition. But it has always been a source of wonder to me how self-styled protectors of the consumer interest could have so readily allied themselves—to such a point that in some cases the distinction between them disappears entirely—with people who seek the assistance of government in suppressing competition.

There are considerations in this case, however, that induce me to go along with continued prohibition, however queasily.

1. The first is grounded in a combination of facts: first, that for apparently all of the summer-peaking electric companies in the state, marginal generating capacity off-peak as well as on is oil-fired, and promises to continue to be for several years; and

that the use of such capacity to provide electricity for resistance heating, because of the fact that it takes something like three btu's of oil to generate the equivalent of one btu of electric energy, is simply far less efficient in energy terms and uses more oil in total than direct combustion of the oil for space heating purposes. (I must point out, however, that the three for one comparison grossly exaggerates the relative inefficiency of electric resistance heating, because it fails to take into account the energy costs of delivery of oil to the various points of consumption; the far less than 100% efficiency with which oil is typically burned in furnaces; the lesser injury to the environment from combustion of oil in electricity generation than, alternatively, in thousands of separate furnaces; and the promise of the heat pump of sharply increasing the efficiency of the use of electricity for heating. But electric space heating still seems to use more oil, typically; and it is a matter of utmost urgency to reduce the dependence of our economy on imported oil, which must supply the growing difference between what we are capable of producing at home and what we consume.)

On the other hand, I find myself in basic disagreement with the popular simplistic view that electric resistance space heating should simply be banned because it is "less energy efficient." I do not accept an exclusively energy standard of value. There are many pertinent costs and benefits besides the direct use of energy to be taken into account in making intelligent economic choices —the relative costs of labor, of capital installations of heating equipment (which also indirectly use energy), the relative comfort and convenience of alternative methods of satisfying needs, the use of other scarce materials, and the damage to the environment. The only sensible common denominator for these various costs is the dollar: provided there are no major distortions in the price tags placed on these various elements of cost, it is the total dollar costs, not just the btu's that should be compared.

Moreover, I do not believe it is the proper function of a public utility regulator to tell people that they cannot have things for which they are willing to pay the price. It is our responsibility

to see that prices reflect costs—all relevant social costs; it is our responsibility also to persuade and educate consumers to make intelligent choices. But I do not conceive it as our responsibility to tell people that they may not have something for whose total marginal social costs they are willing to pay: regulators are all too prone to substitute their judgments of what is good for people for the judgments of the people themselves.

For these reasons, it is only with the greatest reluctance that I go along with a policy that denies one competitor the right to advertise his wares, while leaving another free to do so, because we do not think customers should be encouraged to use electric resistance heating.

2. I do so, additionally, because the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity is the heat pump; but installation of a heat pump means also installation of central air conditioning. To this extent, then, the promotion of off-peak electric space heating involves, in effect, the promotion also of on-peak summer air conditioning. Once again, my espousal of free consumer choice as a general principle would require me to regard such a development with equanimity—were it not for the fact that the price of electricity to most consumers in the state does not fully reflect the apparently much higher marginal social costs of on-peak consumption in summer peaking markets. Until each consumer individually confronts a marginal cost-based, time-of-consumption rate, consumption on peak, with its large marginal use of oil-fired generation, is artificially subsidized.

If, then, the uncontrolled promotion of electric heating means the installation of heat pumps, which mean, in turn, more central air conditioning, the use of which is not charged its full marginal costs, the result is inefficient subsidization of consumption on peak, and higher rates for all consumers.

3. There are, of course, some electric companies in the state whose peaks fall in the winter rather than in the summer. It

would seem that these might be permitted to promote, at least where there is a reasonable basis for believing the effect will be to stimulate sales off peak, improve their load factors, and therefore benefit all customers (provided the rates for the promoted service cover long-run incremental costs). But until we have ascertained in our generic electric rate proceeding (C.26806) whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the state system as a whole, such a relaxation of our ban opens up the possibility that, by permitting upstate, winter-peaking companies to promote summer air conditioning, we may in effect be encouraging a greater expansion of capacity for the State as a whole, which is summer peaking, than would otherwise be desirable. To put it another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even in winter-peaking markets. Until we have resolved these costing questions, there is a danger that permitting individual companies to promote sales off their own individual peaks will in effect involve uneconomic subsidization of those sales.

I do not regard flat prohibitions of promotion by public utility companies abhorrent as a matter of principle. Where a company enjoys something close to monopoly, conferred upon it by public franchise, it does not in my judgment have an unfettered right to advertise. This is particularly so because merely disallowing such expenditures in setting rates, under the glib assumption that these costs will then be borne by stockholders rather than ratepayers, is something of a sham, for reasons I have already set forth.

Nuclear advertising

This last observation applies with particular force to the Commission's decision here to disallow the costs of advertisements publicizing company management views in favor of nuclear power. If electric company executives continue to feel that nuclear energy is in the best interest of their ratepayers, they are

likely to continue to feel a responsibility for publicizing that fact. (And, for reasons we have already set forth in our Rochester Gas & Electric and Long Island Lighting Company decisions on this subject, decisions that the Commission majority reverses today, I would not wish them to refrain.) Since we set our allowance for return on equity at something close to the minimum cost of capital, and most companies in the state are in any event earning something short of that amount, any continuation of such "disallowed" expenditures by utility company managements would in principle require us to raise the return on equity allowance correspondingly. In these circumstances, telling companies to put certain expenditures "below the line" comes out either to telling them to stop making the expenditures entirely, or is essentially cosmetic—and a trifle insincere.

I would have been happy to go along with the resolution of this dilemma proposed by Commissioner Berlin to the RG&E and LILCO cases—namely that utility companies be required to provide equal support for the presentation of opposing viewpoints. A reading of the responses to our call for comments on this subject persuades me, however, that his proposed requirement would expose us to endless litigation; I reluctantly conclude that its administration would be simply impractical.

In these circumstances, my own preference would be to extend the modest lump-sum allowance we have decided to provide for *institutional* advertising to cover discussions of general public policy issues such as the desirability of nuclear power as well. The logic, I suggest, is the same: company managements are likely to feel a continued obligation to present their views on the merits of nuclear energy; they are likely to feel that this is in the interest of their ratepayers, possibly more than their stockholders (who hardly benefit when companies must sell stock below book value in order to finance these extremely costly plants); and I would be inclined to agree.

Following this same reasoning, I repeat my extreme satisfaction at the Commission's resolution of the issue of institutional

advertising. Our decision here is both sensible and non-ideological. We decline to cater to the vulgar view, often demagogically expressed, that public utility companies have no right to communicate with their customers, or to answer the often unjust criticisms to which they are subjected, and that if they wish to do so, the expenditures should be placed "below the line"—an expedient that is in my judgment something of a sham.

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STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

Re: STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

ANNE F. MEAD, Commissioner, dissenting in part:

I concur, with one exception, in the statement of policy issued this day on advertising and promotional practices of public utilities.

The one exception is the area of institutional advertising which is designed to create, enhance or sustain the corporate image of the utility or which indulges in self-congratulation or self-admiration of the utility or its accomplishments. In my opinion these advertisements should not be allowed as an operating expense in any rate schedule proceeding or for rate making purposes.

The institutional advertising which I describe above is not in my opinion a necessary or proper expense in providing utility service. At a time when utility rates are increasing beyond the ability of many to pay, any expense, no matter how small, that is not necessary or beneficial to the consumer should not be allowed for ratemaking purposes.

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Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 6, 1977

COMMISSIONERS PRESENT:

Edward Berlin, Acting Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices.

ORDER DENYING PETITIONS FOR REHEARING

(Issued July 14, 1977)

BY THE COMMISSION:

On February 25, 1977, we issued our Policy Statement on Utility Advertising announcing certain changes in our treatment of this subject. Specifically, we stated: (1) that gas utilities should discontinue direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment and (2) that all utilities should discontinue the practice of using bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy. By Order issued the same day, these changes were put into effect.

Petitions for rehearing have been received from the Consumer Protection Board (CPB), Central Hudson Gas & Electric Corporation, Columbia Gas of New York, Inc., Consolidated

Edison Company of New York, Inc., Niagara Mohawk Power Corporation, New York Telephone Company, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation. Replies to exceptions have been filed by the CPB and the Natural Resources Defense Council, Inc., *et al.*

PROMOTIONAL ADVERTISING

Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy* v *Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void. This case involved a Virginia statute which provided that a pharmacist is guilty of unprofessional conduct if he advertised the price of any prescription drug. There is no contention here that commercial speech falls outside the scope of the First Amendment. But this does not mean that commercial speech may never be regulated.

In *Virginia State Board of Pharmacy,* the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.

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While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*.

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

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Our Statement recognized, however, that some companies have peaks occurring in the winter. To the extent rates cover long-run incremental costs for those companies, there is reason to believe that the promotion of off-peak sales may improve their load factors and benefit their customers. But, as former Chairman Kahn pointed out, before we know that this actually is the case, we must first ascertain whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the State system as a whole,[1] since if we allow winter-peaking companies to promote summer air-conditioning, we may be encouraging a greater expansion of capacity for the entire State, which as a whole is summer-peaking, than would be necessary or desirable.[2]

It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

Columbia Gas specifically objects to our decision to extend the ban on promotional activities by gas utilities to include direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment. Columbia Gas argues that this additional restriction is unnecessary since the Commission now exercises total control over the expansion of its market. Under existing restrictions it cannot take on new customers and it must inform potential customers that it has no gas available for their use. Our new restriction, the company argues, denies

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[1] This question is at issue in Case 26806 (Generic Electric Rate Proceeding). A decision is expected presently.

[2] Expressed another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even for winter-peaking markets.

it the possibility of obtaining new business if, and when, the natural gas supply situation improves and the company is authorized to take on new customers.

The specific purpose of our Order was to reduce the demand for gas. It would be inconsistent with this aim to permit a gas utility to promote the attachment of potential customers. In accordance with our past policy, however, we are prepared to modify, or even remove, this restriction upon a clear showing that the company has firm supplies of gas sufficient for it to engage in some limited promotional activity without lessening the supply of gas available to existing customers.

Political Advertising

Central Hudson also argues that our prohibition on the recovery through rates of expenditures for political advertising somehow violates its Constitutional rights. To support this claim, the company relies on *West Ohio Gas Co.* v *Public Utilities Comm'm*, 294 US 64 (1934) and *Virginia State Board of Pharmacy, supra.* Both cases, however, are inapposite. First, unlike the *Virginia* case, we are not prohibiting the company from expressing its position on matters of public controversy. We are simply not permitting a utility to pass along to its ratepayers the costs involved in publicizing its political views. *West Ohio* stands for the proposition that advertising is a legitimate business expense and, therefore, a reasonable allowance should be provided for this activity. It does not require a dollar-for-dollar reimbursement to the company for any and all expenses incurred.

Bill Inserts

Every utility filing a petition has alleged that our decision to prohibit the use of bill inserts to publicize its views on matters of public controversy violates the First Amendment and, in addition, is too vague. We reject these contentions.

First we think it pertinent that our prohibition in no way attempts to prohibit the companies from making their views

known. But use of the bill insert for this purpose is, in our judgment, improper since it gives a utility a unique and undue advantage in publicizing its position. The utility's billing records make available a selectively chosen target audience. Any material that is enclosed with a bill will be received by the customer since he has no alternative but to pay the bill if he desires continuation of his utility service. While it is up to the customer whether to read the matter contained in bill inserts, utility management obviously has a unique vehicle for getting its material into its customers' hands.

If the bill insert is turned into a mechanism to promote the management's views on controversial issues, the unique advantage of the billing mechanism is then transformed into a device for presenting only one side of this issue. We believe that this confers an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views. Our previously announced ban on controversial material in bill inserts is to preserve the insert for matters that are not merely presentations by partisans on one side of a debate but which contain useful information on topics that are not controversial. In addition to the undue advantage conferred on management, there are several other factors that we also consider important.

The bill insert is not only a unique medium of communications, it is also quite limited: (1) the size and weight of the insert, in principle, should be such that it will fit in an envelope with the bill without increasing the weight of the total package so much as to require additional postage costs; and (2) an insert can be used only so often as a bill is sent by the utility company, usually once a month, but in many cases only once every other month. These limitations mean that utility companies could easily use up much of the scarce resource of bill insert communication by soliciting support for the industry's position on controversial public issues. Bill inserts can, and, in our view, should be used primarily to convey information that is clearly helpful to con-

sumers, such as practical steps that individuals can take to conserve energy. Our prohibition assures preservation of the latter public interest objective.

Since utilities have monopoly franchises conferred by the government, no other person or entity can provide utility service and thereby gain the wide, captive audience for bill inserts enjoyed by them. This makes the utility bill insert medium analogous to the limited radio spectrum, whose use is properly regulated by the government (specifically the Federal Communications Commission), to assure that those who are given the privilege to use limited spectrum space for the operation of radio and television stations act as trustees of the public interest.

Broadcasters, of course, are not precluded from airing their opinions. Indeed, they are encouraged to do so. But, they are required, by the FCC's "fairness doctrine" to present contrasting views on controversial public policy issues, because there simply is not enough spectrum space available to allow everyone with a unique point of view to operate a radio or television station. Since the same limitation is pertinent to utility bill inserts, we considered imposing something like a "fairness" or "equal time" requirement on the companies: if a utility stated its position on a controversial issue in a bill insert, it would have to give an organization with an opposing viewpoint a chance to disseminate its opinion as an insert with the utility's bill. While some of us preferred this approach, we were all convinced ultimately that it would be difficult to administer fairly,[1] and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures.

It is for these basic reasons that we adopted our ruling. And it does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any

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[1] We note that no utility company has submitted to us a proposal for handling controversial issues in bill inserts in this manner.

person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.

We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound public policy decisions. Our ruling does not diminish to any substantial degree the utilities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

The petitioners also argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.

In the Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determinations. One such determination

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[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood* v *District Board of Education,* 45 USLW 4473 (1977).

was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and therefore should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to seek it. We will resolve any request expeditiously so that no undue delay will result.

Con Edison also states that under the Constitution, the field of postal regulation has been preempted by the Federal government. Claiming that our decision on bill inserts is such an interference with the mails, the company argues, therefore, that we have acted illegally. This argument is specious. Our prohibition involves neither direct physical interference with Federal postal activities nor a direct immediate burden on the performance of postal functions. Our Order is in no way an interference with the Federal regulation of the mails. See *Railway Mail Assoc.* v *Corsi*, 326 US 88 (1945).

Out-of-State Political Contributions

We restated in the Policy Statement our long-standing position that political advertising will not be considered a legitimate cost of doing business. Any such expenditures must be recorded below the line. See *Complaint of Grassroots Action, Inc.*, 13 NY PSC 630 (1973); *Statement of Policy on Advertising and Promotional Practices by Public Utilities*, 12 NY PSC 108-R (1972); *Accounting for Donations, Dues and Lobbying Expenditures*, 7 NY PSC 9-R (1967).

CPB is dissatisfied, however, and argues that out-of-state political contributions should be banned completely, claiming that any connection between out-of-state political actions and the New York operations of a utility is too remote.

Appendix D-3

In *Grassroots*, we considered the issue of political contributions by utilities and held that, as long as these expenditures are minor, so that they have little or no effect upon a utility's financed stability, we will give our general consent and approval as required by Section 107 of the Public Service Law for non-utility-related expenditures. We stated that to require prior approval for each expenditure before a utility could speak out in the public forum on matters which could affect it would be undesirable. We see no reason to depart from this general policy even when out-of-state expenditures are involved.

PERCENTAGE LIMITATION ON ADVERTISING EXPENDITURES

New York Telephone argues that our guideline limitations on institutional and informational advertising[1] would result in significant reductions in reasonable advertising expenditures. The company argues that we erred in making no distinction among the various types of advertising that fall within these broad categories. For example, legally required notices and purely informational advertising, *i.e.*, notification of emergency procedures or changes in billing practices should fall outside the scope of our guideline limitations.[2]

NYT also claims that the ceiling on advertising expenditures imposed by our Guidelines serves no useful purpose since staff must still determine whether any particular advertisement is political or self-serving. In any event, the company points out the entire lump sum allowance may still be questioned in a rate proceeding.

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[1] The phrase "and informational" was inadvertently omitted from the last line of footnote 1 on page 13 of our Statement. The last line of that footnote should read "institutional and informational advertising allowance on brief."

[2] The company estimates that 1977 expenditures for informational and institutional advertising will exceed $4 million, including $600,000 for legally required notices. Under strict application of our Guidelines, only $1,635,000 would be recoverable from rates.

Appendix D-3

We recognized that our new policy would not solve all the problems relating to advertising. It is, however, an improvement over our past practice of conducting an item-by-item examination and evaluation of past advertisements—a practice which took valuable staff time, time which could be far better used checking on other, quantitatively larger expense items. What we are doing here is establishing a relatively simple procedure to determine a reasonable allowance for future institutional and informational advertising. We intend to monitor the results of this new policy and to make any modifications necessary in light of this experience. We also recognize that expenses associated with legally required advertising vary depending on the territory served by the utility. We are prepared, therefore, to take such differences into account in applying our Guidelines to individual companies.

CONCLUSION

We have reviewed the petitions for rehearing filed in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and conclude that they present no new arguments of fact or law which warrant modification of our Statement. The petitions are, therefore, denied.

The Commission orders:

1. The petitions for rehearing filed by the parties listed in the Appendix to this Order in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and accompanying Order, issued February 25, 1977, are denied.

2. This proceeding is closed.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

APPENDIX

Parties Filing Petitions for Rehearing

Central Hudson Gas & Electric Corporation
Columbia Gas of New York, Inc.
Consolidated Edison Company of New York, Inc.
New York State Electric & Gas Corporation
New York Telephone Company
Niagara Mohawk Power Corporation
Rochester Gas and Electric Corporation
Consumer Protection Board

Appendix E

Petition to the New York Supreme Court, Albany County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

PETITION

Index No. 11317-77

In the Matter

of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, by its attorneys, Messrs. Gould & Wilkie, hereby petitions the Supreme Court of the State of New York, Albany County, for a judgment pursuant to Article 78 of the Civil Practice Law and Rules annulling, vacating and setting aside certain provisions of an "Order Implementing Certain Restrictions on Utility Advertising" and "Statement of Policy on Advertising and Promotional Practices of Public Utilities" issued by the Public Service Commission of the State of New York on February 25, 1977 and of "Order Denying Petitions for Rehearing" issued by said Commission on July 14, 1977.

In support of such petition Central Hudson Gas & Electric Corporation alleges as follows:

1. Petitioner, Central Hudson Gas & Electric Corporation ("Central Hudson"), is an electric and gas utility corporation, duly incorporated under the laws of the State of New York, with

its principal office at 284 South Avenue, Poughkeepsie, New York. Central Hudson supplies electric and gas service to residents of the Mid-Hudson region of New York State.

2. Respondent, Public Service Commission of the State of New York ("Commission"), is an administrative body of the State of New York organized and existing under the *Public Service Law*. The Commission's principal office is in the City and County of Albany.

3. Petitioner, as an electric utility corporation, is subject to the regulatory authority of Respondent with regard to the electric and gas service furnished by Petitioner.

4. On February 25, 1977, Respondent issued an "Order Implementing Certain Restrictions on Utility Advertising" and "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (herein "Order" and "Policy Statement", respectively). A copy of the Order is attached hereto as Exhibit A and a copy of the Policy Statement is attached hereto as Exhibit B.

5. The Policy Statement sets forth Respondent's determination to continue a prohibition on promotional advertising by electric utility corporations which had been originally established by it by Order issued on December 5, 1973.

6. The Policy Statement and Order establish Respondent's prohibition of the use by a public utility company of bill inserts (i.e., material inserted with bills sent to customers) as a means to disseminate its positions on matters of public controversy.

7. The Policy Statement sets forth Respondent's determination and policy to treat as "political", and therefore not properly chargeable to ratepayers, advertising on matters of immediate concern to Petitioner and its customers which relate to issues before the public, such as nuclear energy, environmental issues and energy policy in general.

8. On March 28, 1977, Petitioner filed with Respondent a petition for rehearing of the Order and Policy Statement pur-

suant to Section 22 of the *Public Service Law*, a copy of which is attached hereto as Exhibit C.

9. In its petition for rehearing, Petitioner urged Respondent to reconsider its positions set forth in the Order and Policy Statement on the grounds that (i) the continued prohibition of promotional advertising by electric utility corporations violates Petitioner's constitutional rights of freedom of expression, (ii) the prohibition of Petitioner's right to use bill inserts for the dissemination of its position on matters of public controversy violates Petitioner's Constitutional rights of freedom of expression and (iii) the determination and policy to disallow, as a proper charge for ratemaking purposes, the costs of advertisements on matters of immediate concern to Petitioner and its customers relating to issues before the public, such as nuclear energy, environmental issues and energy policy in general, are arbitrary and capricious and violate Petitioner's constitutional rights.

10. On July 14, 1977, Respondent issued an "Order Denying Petitions for Rehearing" (herein "Order on Rehearing"), a copy of which is attached hereto as Exhibit D.

11. In the Order on Rehearing, Respondent denied Petitioner's request for rehearing and reconsideration.

12. No previous application has been made to this Court or any justice thereof for the relief sought herein.

First Cause of Action

13. Petitioner repeats the allegations contained in paragraphs 1 through 5 and 8 through 12.

14. Respondent's prohibition of promotional advertising by Petitioner is not reasonable regulation of Petitioner's commercial speech and thus violates the First and Fourteenth Amendments of the United States Constitution and of Article I, Section 8 of the Constitution of the State of New York.

Appendix E

Second Cause of Action

15. Petitioner repeats the allegations contained in paragraphs 1 through 4, 6, and 8 through 12.

16. Respondent's prohibition of the use by Petitioner of bill inserts sent to its customers as a means of disseminating its position on matters of public controversy violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Constitution of the State of New York as it improperly restricts the use by Petitioner of an available means of communicating with its customers.

17. Such prohibition of the use of bill inserts also violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Constitution of the State of New York as it represents an attempt by Respondent to regulate speech on the basis of content.

18. Such prohibition of the use of bill inserts to disseminate Petitioner's position on "matters of public controversy" further violates the First and Fourteenth Amendments of the United States Constitution and Article I, Sections 6 and 8 of the Constitution of the State of New York as it attempts to establish a standard to regulate the speech of Petitioner which fails to give adequate notice of the scope of its proscription and which fails to give adequate guidance for its application and, consequently, is unconstitutionally vague and overbroad.

Third Cause of Action

19. Petitioner repeats the allegations contained in paragraphs 1 through 4 and 7 through 12.

20. Respondent's determination and policy to disallow, as a proper charge for recovery from ratepayers, the costs of advertisements by Petitioner on matters such as nuclear energy, environmental issues and energy policy in general, which are of immediate concern to Petitioner and its customers, are arbitrary and capricious as they represent an unwarranted invasion

by Respondent into the discretion of Petitioner's management and will deny recovery by Petitioner of costs which ultimately benefit its ratepayers.

21. Such determination and policy to disallow such advertising costs as reasonable costs for ratemaking purposes will work to deny Petitioner the opportunity to communicate on such matters in violation of the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Constitution of the State of New York.

WHEREFORE, Petitioner requests this Court to:

(1) Review pursuant to Article 78 of the Civil Practice Law and Rules, the Order and Policy Statement and Order on Rehearing of Respondent, and enter a judgment annulling, vacating and setting aside said Order and Policy Statement and Order on Rehearing to the extent that they (i) prohibit advertisements by Petitioner which promote the use of electric energy, (ii) prohibit Petitioner from utilizing bill inserts as a means to disseminate its positions on matters of public controversy and (iii) establish a policy of disallowing for ratemaking purposes the costs of advertising by Petitioner on matters of immediate concern to Petitioner and its customers such as nuclear energy, environmental issues or energy policy in general;

(2) Declare that Respondent's Order and Policy Statement and Order on Rehearing violate Petitioner's constitutional rights and are arbitrary and capricious to the extent that they (i) prohibit advertisements by Petitioner which promote the use of electric energy, (ii) prohibit Petitioner from utilizing bill inserts as a means to disseminate its positions on matters of public controversy and (iii) establish a policy of disallowing for ratemaking purposes the costs of advertising by Petitioner on matters of immediate concern to Petitioner and its customers such as nuclear energy, environmental issues or energy policy in general;

(3) Grant Petitioner such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 4, 1977

GOULD & WILKIE

/s/
By DAVISON W. GRANT
A member of the firm
Attorneys for Petitioner
Central Hudson Gas &
Electric Corporation
One Wall Street
New York, N. Y. 10005
(212) 344-5680

[Verification and Exhibits Omitted]

Appendix F-1

Judgment of the Court of Appeals of the State of New York, May 1, 1979

Remittitur

COURT OF APPEALS, STATE OF NEW YORK

THE HON. LAWRENCE H. COOKE, Chief Judge, presiding

No. 151
In the Matter of
CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,
vs.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

The appellant in the above entitled appeal appeared by Gould & Wilkie; the respondent appeared by Peter H. Schiff.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

[SEAL]

JOSEPH W. BELLACOSA
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany

May 1, 1979

Appendix F-2

Order of the Court of Appeals of the State of New York Denying Rehearing, July 9, 1979

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of July A. D. 1979

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

Mo. No. 597

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

[SEAL]

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Appendix G

Notice of Appeal to the Supreme Court of the United States, August 22, 1979

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11317-77

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioner,

–against–

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Central Hudson Gas & Electric Corporation, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered in this action on July 9, 1979, denying Petitioner's motion for reargument of those portions of said Court's determination of May 1, 1979, which sustained the prohibition by the New York Public Service Commission of promotional advertising by electric utilities and denied Petitioner's petition herein.

Appendix G

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: August 17, 1979

Dated and Entered:
August 22, 1979
Office of Albany County Clerk
Albany, N. Y.

Yours, etc.

GOULD & WILKIE
One Wall Street
New York, New York 10005
(212) 344-5680

TAYLOR, FERENCZ & SIMON
60 East 42nd Street
New York, New York 10017
(212) 661-0930
Attorneys for Petitioner

To: Clerk of the Supreme Court,
Albany County
Albany County Courthouse
Albany, New York 12207

PETER H. SCHIFF, ESQ.
Counsel to the Public Service Commission
of the State of New York
Empire State Plaza
Agency Building No. 3
Albany, New York 12223
(518) 474-2510
Attorney for Respondent

Appendix G

AFFIDAVIT OF SERVICE

Index No. 11317-77

CERTIFICATE OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

THOMAS C. HUTTON, being duly sworn, deposes and says:

I am an associate of the law firm of Gould & Wilkie, One Wall Street, New York, New York 10005, attorneys for Central Hudson Gas & Electric Corporation, Petitioner.

On August 17, 1979, I served the annexed Notice of Appeal to the Supreme Court of the United States on the Public Service Commission of the State of New York, Respondent, by depositing a true copy of the same in a properly addressed wrapper with first class postage prepaid to Peter H. Schiff, Esq., General Counsel, Public Service Commission of the State of New York, Agency Building No. 3, Empire State Plaza, Albany, New York 12223 in an official mail box under the exclusive care and

custody of the United States Postal Service within the State of New York.

All parties required to be served have been served.

/s/
THOMAS C. HUTTON

Sworn to before me this
17th day of August, 1979

/s/
DOREEN M. SCHRAUFL
Notary Public

DOREEN M. SCHRAUFL
Notary Public, State of New York
No. 30-4606708
Qualified in Nassau County
Commission Expires March 30, 1981

Appendix H

NEW YORK PUBLIC SERVICE LAW,

Sections 4, subd. 1; 5, subd. 2; and 66, subds. 1, 2, 4 and 5.

§4. The public service commission

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

§5. Jurisdiction of public service commission

* * * *

2. The commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.

§66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or

of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electric corporations and municipalities; and have power after an investigation and a hearing to order any corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of supplying, selling or distributing natural gas, to augment its supply of natural gas, whenever the commission deems necessary and whenever artificial gas can be reasonably obtained, by acquiring by purchase, manufacture or otherwise a supply thereof to be mixed with such natural gas, in order to render adequate service to the customers of such corporation or to maintain a proper and uniform pressure; and have power after an investigation and a hearing to order any corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of supplying, selling or distributing artificial gas, to augment its supply of artificial gas, whenever the commission deems necessary and

whenever natural gas can be reasonably obtained, by acquiring by purchase or otherwise a supply thereof to be mixed with such artificial gas, in order to render adequate service to the customers of such corporation or to maintain a proper and uniform pressure; and to fix such rate for the supplying of mixed gas as shall secure to such corporation a fair return; and may order the curtailment or discontinuance of the use of natural gas for manufacturing or industrial purposes, for periods aggregating not to exceed four months in any calendar year, if it is established to the satisfaction of the commission that the supply of natural gas is not adequate to meet the reasonable demands of domestic consumption and may prohibit the use of natural gas in wasteful devices and practices.

* * * *

4. Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations and electric corporations and by municipalities engaged in the manufacture, sale and distribution of gas and electricity for light, heat or power. It may also in its discretion prescribe, by order, forms of accounts, records and memoranda to be kept by such persons, corporations and municipalities. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporations shall be subject to examination by the commission.

5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, charges or classifications or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commis-

sion shall determine and prescribe in the manner provided by and subject to the provisions of section seventy-two of this chapter the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished notwithstanding that a higher or lower rate or charge has heretofore been prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

* * * *

Appendix I

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practice, July 28, 1976

NOTICE OF PROPOSED POLICY STATEMENT AND REQUEST FOR COMMENTS ON ADVERTISING BY PUBLIC UTILITIES AND ELECTRIC PROMOTION PRACTICES

(Issued July 28, 1976)

Over the years, the Commission has developed a series of policies relating to advertising by public utility companies and other practices designed to stimulate increased sales of electricity. Some of these policies have in recent months been called into question, and the Commission is considering revising them. To this end, we solicit comments from interested parties to be submitted, in writing, to the Secretary of the Commission, Empire State Plaza, Albany, New York, 12223, not later than September 13, 1976.

The promotion of electricity sales

On December 6, 1973, at the height of the energy crisis precipitated by the exporting countries' boycott, the Commission flatly prohibited all sales promotional activities by electric companies. We are now considering relaxing that prohibition.

There is one aspect of the proposed relaxation on which we do *not* solicit comments at this time. That would be such promotion as would be the incidental consequence of efforts by electric utility companies to publicize, explain, and advise consumers on how best to take advantage of time-of-consumption rates. As the companies introduce such rates, informational activities of this kind are clearly desirable, even where they might have the incidental effect of increasing the aggregate sales of electricity.

The proposition on which we do solicit reactions is that we relax our absolute prohibition of sales promotional activities by electric companies generally, apart from those that are merely

ancillary to the introduction of time-of-consumption rates. (The distinction will in important instances be difficult to draw: since the downstate companies are summer-peaking, one purpose or result of rates varying by the season of the year could be to promote the use of electric heating, and, largely because of the very heavy use of electricity involved, this is the most controversial promotion of all.)

On the side of continuing the flat prohibition are such considerations as the following:

1. Electric companies are franchised monopolists, and no public interest or need is served by permitting monopolists to promote sales.

2. It is especially undesirable to cover the costs of such promotional activities in rates, thereby forcing captive customers to pay for activities designed to influence their consumption habits (in contrast with merely providing them with information).

3. Turning specifically to the promotion of electric resistance space and water heating: it conflicts with the national interest in energy conservation to promote additional utilization of electricity, which by its very nature uses approximately 3 Btu's of source energy to deliver 1 usable Btu. Electric resistance heating is therefore inherently inefficient in its use of primary energy, compared with the direct buring of gas or oil in furnaces, even after making allowance for the greater efficiency-in-use of the electricity than those fuels.

4. The equipment for electric resistance heating is considerably less costly than for gas or oil. Since builders typically have a strong incentive to hold down the first costs of construction, they may already have a distorted incentive to install the former in preference to the latter, even though the result may be to impose markedly higher annual heating costs thereafter on the purchasers, who are frequently, perhaps typically, not in a position to weigh the higher future running costs against the

lower initial purchase price in making their purchase decisions. In these circumstances, it is particularly undesirable further to encourage irrational purchase decisions by permitting the promotion of electric heating.

5. The heat pump promises to mitigate some of these efficiency disadvantages of electric resistance heating; however, the effects of its widespread introduction on utility peak load and load factors are uncertain.

Arguing on the side of a relaxation are the following considerations:

1. In major uses, electricity competes with oil and gas, and while we proscribe the promotion of gas, the distribution of heating oils is totally outside our control, and advertising by those distributors freely permitted: in these circumstances, it is not only unfair but produces distorted results for consumers to be freely exposed to advertising messages by one set of competitors, while the other is totally prohibited from communicating with them.

2. Electricity and electrical appliances compete with all other goods and services for the consumer's limited dollars. It is inconsistent with a consumer-sovereign and free enterprise economy for certain goods and services to be denied the right to compete for those dollars while other competitors—many of which may be promoting even less energy-conserving consumption—remain unrestricted. It is the function of a regulatory Commission in such an economy to see to it that prices accurately reflect cost—not to go beyond that and dictate to consumers and businesses, directly or indirectly, how they should allocate their expenditures. Consumers are, to be sure, entitled to protection against misleading advertising, and the foregoing considerations would probably not absolve the Commission from responsibility to ensure that the promotional information supplied by franchised public utilities is in fact not misleading. The proper solution to the possible problem, described earlier, aris-

ing from the possibility that builders may have a distorted incentive to install electric resistance heating, because of its lower first cost, is to provide purchasers with reliable information about the expected life cycle costs of buildings equipped with different heating systems.

3. The function of the Commission is to see to it that the prices of the services it regulates reflect society's costs in supplying them, and that consumers are well-informed—not to tell consumers what advertising messages they may and may not hear.

4. Gas is in short supply, and in most territories unavailable for use in new construction, so that for most uses the only available alternative to electricity for space heating is oil. Prohibition of electricity promotion thus contributes to giving oil a monopoly in that market (whether this creates a danger of monopolistic exploitation depends on the effectiveness of competition in the oil industry).

5. While promotion of heating with electricity generated from oil (because of its less efficient use of the primary energy source) runs counter to our national policy of reducing our dependence upon imported oil, the increased use of electricity generated from nuclear fuel and coal would make a positive contribution to that goal.

6. Electric space heating is environmentally preferable to the direct combustion of oil: it is less polluting to burn fuels in central electricity generating stations than in thousands of individual furnaces.

* * * *

Appendix J

Selections from Opinion of United States District Court, Eastern District of New York, March 30, 1979

DOCKET NO. 77 C 972

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

–against–

THE NEW YORK STATE PUBLIC SERVICE COMMISSION et al.

Defendants.

PRATT, J:

I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use. . . .

* * * *

B. *PSC's Policy and Orders.*

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electric energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * * ". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space

heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subjects of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies," (Policy Statement). As part of that statement PSC concluded "that the existing ban on promotion of electricity sales should be continued."

* * * *

IV. PSC's Ban on Promotional Advertising of Electrical Energy

A. *Factual Background.*

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electric space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the summer months, attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its generating facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electric space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

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When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electric space heating. Despite contentions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricity advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." 1977 Policy Statement at 5.

In short, PSC continued its ban on promotional advertising of electricity in order to reduce consumption of electricity and other energy resources. PSC did, however, permit public utilities to advertise time-of-day rates as a means of encouraging shifts of electrical energy consumption from peak to off-peak times, without increasing aggregate sales, and it indicated that should there be a sufficient change in conditions it would from time to time reexamine its ban on promotional advertising of electrical energy.

Although it may not advertise electric heat, LILCO is permitted to provide advice and information to any individual who requests such information. Moreover, PSC has not barred public

utilities from advertising the merits of gas fired space heating, nor does it restrict advertising for oil fired space heating, since PSC has no jurisdiction over oil dealers.

Without conceding their truth, LILCO has assumed the following allegedly material facts solely for purposes of the motion for summary judgment:

> 1. That electric space heating consumes more oil than oil fired space heating;
>
> 2. That electric space heating is ecologically less desirable than oil fired space heating;
>
> 3. That promotion of electric space heating may cause a general rise in the demand for electricity; and
>
> 4. That there is substantial difficulty in establishing a pricing structure for electric space heating service which accurately reflects the marginal cost of providing such service to each consumer.

PSC urges, however, that other allegedly material facts are in dispute and prevent summary judgment. First, PSC asserts that LILCO's concession on pricing structure is limited only to electric space heating, when the issue is whether the rates charged for *all* electric service can be based on an economically efficient pricing structure which would also adequately reflect the marginal costs of electric production for all consumers of electricity. Second, PSC contends that promotion of electric space heating will lead to greater use of heat pumps, which will in turn produce an increase in the peak-time (summer) consumption of electricity due to increased use of air conditioning. Finally, PSC claims there is a factual issue as to whether increased electric production by LILCO would result in increased use of energy inefficient gas turbines, the costs of which would be passed on to all of LILCO's customers, not just those who use electric space heaters.

These factual issues raised by PSC are more appropriate to a PSC proceeding involving the merits of electric heat or a proper

pricing structure for electric heat rates. They are not material to a decision on LILCO's first amendment challenge to PSC's flat ban on all promotional advertising of electrical energy. The issue is not whether PSC may directly prohibit or restrict the use of electric heat, but whether PSC may attempt to do so by preventing public utilities from truthfully advertising its advantages. On this issue the merits or demerits of electric heat are simply not material.

B. *Discussion.*

To decide this issue, the court must assess LILCO's and the public's first amendment interests in the free flow of information contained in the advertising, and then determine whether such interests are outweighed by the public interests allegedly served by the ban on such advertising. See *Bigelow* v. *Virginia, supra,* 421 US at 826; *Metpath, Inc.* v. *Imperato,* 450 F Supp 115, 117 (SDNY 1978).

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See *Bates* v. *State Bar, supra,* 433 US at 363-64; *Virginia State Board* v. *Virginia Citizens, supra,* 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to

utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in *Bates* v. *State Bar, supra,*

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> *Bates* v. *State Bar, supra,* 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board* v. *Virginia Citizens, supra,* 425 US at 756.

The next question is whether the interests allegedly furthered by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York

> State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendant's Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electric consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*
>
> *Bates* v. *State Bar, supra,* 433 US at 374-75 (emphasis supplied).

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In *Virginia State Board, supra,* a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proferred justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * * [T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.
>
> * * *
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.
>
> * * *
>
> *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First amendment makes for us.* Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them * * * in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.
>
> *Virginia State Board* v. *Virginia Citizens, supra,* 425 US at 768-70 (emphasis supplied) (citations omitted).

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PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Serv. Law §66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See *Virginia State Board, supra,* 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting communication to a customer *if* he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in *Bates* v. *State Bar, supra*; on posting "For Sale" signs on homeowners' lawns in *Linmark Associates* v. *Township of Willingboro, supra*; on advertising prices of prescription drugs in *Virginia State Board, supra*; or on advertising contraceptives in *Carey* v. *Population Services, supra.* Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication' ". *Linmark Associates, Inc.* v. *Township of Willingboro, supra,* 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> *First National Bank* v. *Bellotti, supra,* 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information". Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

* * * *

Appendix K

Extracts of United States Congressional Committee Reports.

PUBLIC UTILITY REGULATORY POLICIES ACT, CONFERENCE COMMITTEE REPORT, H. R. Rep. No. 95-1750, 95th Cong., 2nd Sess. 77 (1978).

Section 113. Adoption of certain standards.

* * * *

The conferees stress that the standard on advertising prohibits recovery of expenditures for promotional or political advertising from anyone "other than the shareholders (or other owners)" of the utility, instead of prohibiting recovery from the electric consumers of the utility, as did the House bill. Without this change from the House bill, utilities for which the owners are also the electric consumers, i.e. cooperatives, could be effectively prohibited from undertaking any political or promotional advertising if this standard were adopted. Adoption of the standard does not prohibit any utility from engaging in this kind of advertising. The standard merely specifies who is to pay for the advertising.

NATIONAL ENERGY ACT, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE REPORT, H. R. Rep. No. 95-496, Part 4, 95th Cong., 1st Sess. 138-40 (1977).

Section 512. Minimum Standards Respecting Advertising

Section 512 sets certain minimum Federal standards regarding the use of revenues recovered from electric consumers by States-regulated electric utilities for promotional, political or institutional advertising. Most States have restrictions similar or even stricter than those contained in this section. States may, of course, continue to have stricter standards. The section establishes that no rate of any State regulated utility using such revenues for such advertising will be found to be in compliance with subchapter B of chapter 2.

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This ban on the use of consumer revenues does not apply to (1) advertising which informs electric consumers how they can conserve electric energy or reduce peak demand for electricity both of the system and of the individual electric consumer, (2) notices required by law or regulation, (such as information required to be given under part A of this title) or (3) public information regarding service interruptions, safety measures or emergency conditions, (4) advertising concerning employment opportunities with such utility and (5) public distribution or explanation of existing or proposed rate schedules or hearings thereon.

Certain terms are defined in section 512. The term "advertising" is defined to mean the commercial use by an electric utility of any media, including newspaper, printed matter, radio and television, in order to transmit a message to a substantial number of members of the public or to the utility's electric consumers. Billing inserts are clearly covered by this definition. "Institutional advertising" is defined to mean any advertising designed to create, enhance or sustain an electric utility's public image or goodwill with the general public or the utility's electric customers. "Political advertising" is defined to mean any advertising for the purpose of influencing public opinion with respect to any legislative, administrative, or electoral matter, or with respect to any controversial issue of public importance. Finally, the term "promotional advertising" is defined to mean advertising for the purpose of inducing the public to select or use the service or additional service of an electric utility or to select or install any appilance or equipment designed to use the utility's service.

The committee wishes to stress that section 512 does not prohibit advertising by electric utilities. The section merely states that if the utility wishes to undertake certain kinds of advertising, it may not do so with revenues recovered from its electric consumers. The committee does not wish in any way to discourage electric utilities from advertising electric energy conserving appliances or devices or on peak demand limiting techniques or

devices. Thus, section 512's restriction on the use of revenues recovered from electric consumers does not apply to such advertising, regardless of the fact that this advertising might be promotional in nature because it may induce consumers to purchase products which use electricity. In all cases it is intended that the energy conservation objective should be the principle of first importance.